In the Supreme Court of the United States

OCTOBER TERM, 1937

No. 499

THE UNITED STATES OF AMERICA, PETITIONER

v.

ROBERT K. WURTS

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

Respondent's brief proceeds in large part upon the argument that Section 610 (b) applies to credits as well as refunds, that the effective date of a credit is the date of "allowance" (*United States* v. *Swift & Co.*, 282 U. S. 468), and that therefore the date of the "making" of a *refund* must also be the date of "allowance." Otherwise, contends respondent, the two year period would begin to run from one date in the case of credits and from another date in the case of refunds—a result that is said to be inadmissible.

This reply brief is filed in response to those contentions since they are predicated upon a major premise that is wholly false. Respondent seriously

errs in suggesting that Section 610 is applicable to credits.

Section 610 is entitled "Recovery of Amounts Erroneously Refunded." Throughout it deals only with a tax which has been "erroneously refunded," and prescribes the period within which suit may be instituted for the *recovery* of "such refund." Nowhere is there any suggestion that it applies also to credits which have been erroneously allowed.

The procedure followed to correct an erroneous credit is entirely different and must be sharply distinguished from suits to recover an erroneous refund. Whenever it is discovered that the Commissioner has erroneously determined an overpayment of a tax and has credited the amount against another tax then due, the credit is expunged. The Government then proceeds, if possible, to collect the tax against which the erroneous credit was made. No suit is ever brought to "recover" an erroneous credit.

A letter from the Commissioner of Internal Revenue, which sets forth the administrative practice in this regard, has been filed with the Clerk, and is reproduced, *infra*, in the Appendix, p. 5.

Accordingly, Section 610 (b) by its very nature deals exclusively with refunds. There is, therefore, no possibility of any inconsistency in the date from which the period of limitations is to be measured, since Section 610 (b) has nothing whatever to do with credits, nor is there any other provision of

law which limits the time within which an erroneous credit may be eliminated. In the case of an erroneous credit the taxpayer is accorded repose by the statute of limitations regulating the collection of the tax against which the erroneous credit was made. The credit itself may be reversed at any time.

Considerable confusion has arisen in the attempted application of *United States* v. *Swift & Co.*, 282 U. S. 468, to the present case. In the *Swift* case the taxpayer was suing to recover a tax which had been paid by means of credit. The question there was whether the claim for refund had been filed in time to maintain the suit, and that question in turn depended upon when the tax was paid. This Court held that it was paid upon the date of allowance of the credit, which was the date upon which the Commissioner signed the appropriate schedule. Thus, in the case of credits, the date of allowance constitutes the date of *payment* of the tax against which the credit is taken. This is because the *allowance of a credit is the operative act* which effects the discharge of the taxpayer's liability upon the other tax. Allowance in case of a credit is, therefore, payment. That is all that was decided in the *Swift* case. In sharp contrast, however, allowance in the case of refund is *not* payment. See *Daube* v. *United States*, 289 U. S. 367.

It is our contention that the "making" of a re-

fund within the meaning of Section 610 (b) must be payment. In the case of credits, the date of allowance and the date of payment are the same, since the allowance is the operative act of the Commissioner which discharges the other liability. With respect to refunds, on the other hand, allowance is merely a step that precedes the actual *making* of the refund.

Respectfully submitted.

GOLDEN W. BELL,
Acting Solicitor General.
JAMES W. MORRIS,
Assistant Attorney General.
J. LOUIS MONARCH,
ARNOLD RAUM,
JOSEPH M. JONES,
Special Assistants to the Attorney General.

FEBRUARY 1938.

APPENDIX

Letter of the Commissioner of Internal Revenue on administrative practice with respect to erroneous credits:

TREASURY DEPARTMENT

WASHINGTON

Office of
Commissioner of Internal Revenue

Address Reply to
Commissioner of Internal Revenue
and refer to
IT:C1:ECW

FEB. 5, 1938.

Honorable JAMES W. MORRIS,
Assistant Attorney General,
Department of Justice.

Attention: Mr. Arnold Raum.

SIR: With respect to your recent informal request for information as to the application, in practice, of Section 610 (b) of the Revenue Act of 1928 to credits, you will, of course, note that the language of the section limits its effect to amounts "erroneously refunded." This Bureau has consistently construed said section as not applying to credits.

The practice, in the case of erroneous credits, has been to eliminate or reverse the credit and proceed with the collection of the tax to which the credit had been erroneously applied, unless the limitation on collection had expired, in which event collection could not be legally enforced.

Being of the opinion that there is no legal basis for maintaining a suit for the recovery of an erroneous credit, this Bureau had never requested or recommended that such a suit be brought, and is not aware of any suit having been instituted for the recovery of an erroneous credit.

Respectfully,

[Signed] GUY T. HELVERING,
Commissioner.

U. S. GOVERNMENT PRINTING OFFICE: 1939

INDEX

	PAGE
Counter-Statement of Question Presented	1
Reasons for Disallowance of the Writ	2
Argument	2
Appendix	15

CASES CITED

Burnet v. S. & L. Building Corp., 53 S. Ct. 428, 288 U. S. 406 11

Girard Trust Co. v. United States, 270 U. S. 163 ..... 5, 7

Hartford Connecticut Trust Co. v. Eaton, 8 Fed. Supp. 218 4

Hecht v. Malley, 44 S. Ct. 462, 265 U. S. 144 10

Llewellyn v. Harbison, 31 Fed. (2nd) 740, cert. den. 50 S. Ct. 18, 280 U. S. 560 11

Pampanya Sugar Mills v. Trinidad, 49 S. Ct. 308, 279 U. S. 211, 73 L. Ed. 665 11

Paulson v. U. S., 78 Fed. (2nd) 97 (C. C. A. 10th) 2

United States v. Katz, 46 S. Ct. 513, 271 U. S. 354 10

United States v. Swift & Co., 282 U. S. 468 6

United States v. Steel Furniture Co., 74 Fed. 744 (C. C. A. 6th Cir.) 13

United States v. Updike, 281 U. S. 489 13